IN THE MATTER OF ARBITRATION BETWEEN

X. Y.

and

CITY OF Z.

Grievance no. 2080062

ADVISORY OPINION AND AWARD

ARBITRATOR: Richard C. Solomon

DATE OF HEARING: September 27, 2010

APPEARANCES: X. Y. (representing himself)

Howard B. Golds, Esq. (for the Employer)
Best Best & Krieger LLP

INTRODUCTION:

The arbitrator was duly selected by mutual agreement of the parties under the auspices of the California Mediation and Conciliation Service to render an advisory opinion. Arbitrability is not an issue, and the parties have stipulated that the matter is properly before me. All witnesses were sworn and subject to cross-examination. Pursuant to City policy, Mr. Y timely requested that nine City employees be directed to appear at the hearing (one turned out to be a former employee so the City had no power to compel his attendance); grievant was properly informed and reduced his request to eight employees. According to the City's representative, six refused to attend the hearing even if ordered. I informed the parties of my authority and willingness to direct those six witnesses to appear, after which Mr. Y withdrew his request that they do so. Oral and documentary evidence was received. Upon conclusion of the hearing, the parties agreed to submit post-hearing briefs. Those briefs have been received, and the matter is now deemed submitted for decision.

THE ISSUES

Did the City have good cause to discharge Mr. Y and, if not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article XVIV(D), Section 3 of the MOU between the City and the City of Z Employees Association (also referred to as Personnel Rules) states that "[g]rounds for disciplinary action

shall include, but not be limited to:

a. Dishonesty
b. Incompetence
c. Inefficiency
d. Neglect of duty
* * *
l. Substandard job performance
m. Insubordination. . .”

THE PARTIES’ CONTENTIONS

The City contends that it had good cause to discharge Mr. Y because of his unsatisfactory work performance beginning in 2004 and the many warnings and other forms of progressive discipline that had failed to improve his performance.

Mr. Y contends that all but one of the alleged instances of unsatisfactory work performance either did not happen or were attributable to other employees or customers. He further contends that the alleged complaints with his work began when his current supervisor was appointed, that this supervisor and grievant never got along, that most if not all drivers missed pickups but were not disciplined, and that he is being singled out for termination. He claims he was fired because he complained about his supervisor’s unfair treatment of him or for cost-cutting reasons, or both. In either event, the City lacks good cause to discharge.

SUMMARY OF THE EVIDENCE

Mr. Y’s last position with the City was senior solid waste operator: he drove a truck on an assigned route to pick up residential and commercial trash and recyclables. He was hired in 1999. In 2004, 2007, and twice in 2008, grievant was disciplined in the form of written warnings that he had failed to perform certain enumerated job tasks such as treating customers respectfully and picking up trash at given locations. The City introduced evidence that each warning was based on more than one example of unacceptable work performance. City Exh. 4, 5, 6, 7. The May, 2008 incident was worse than poor job performance: in attempting to pull a dumpster out of an enclosure at a hotel, Mr. Y maneuvered it so as to hit the wall and damage a gas line. He immediately reported the gas smell to the hotel management. Ten days later, a supervisor interviewed grievant and asked what had happened; grievant claimed that when he arrived at the location he smelled a gas leak. The supervisor asked grievant if he thought he might have hit the gas line with the dumpster and he said no. The supervisor played a surveillance video that the City had obtained from the hotel which clearly showed grievant roughly handling the dumpster and slamming it against the wall near the gas fitting. This written reprimand was based not on his having hit the gas line but having lied about it, a more serious violation.

In October, 2009, he was charged with being inappropriately rude to his supervisor and two customers, for refusing to deliver his recycling load to the recycling center, for delivering substantially less recycling materials than normally expected on three occasions, for missing

three pickups on his route, and for other conduct which his supervisors considered inappropriate (such as showing up for work one day wearing a sombrero, allegedly to mock a Hispanic driver who wears a cowboy hat when driving). City Exh. 8. He was suspended for five days for these incidents. Mr. Y disagreed with the factual basis for the discipline and the suspension itself. He requested and had a meeting with A. B., the Assistant City Manager, during which he complained, among other issues, about his supervisor's misconduct as the factor motivating the discipline. Mr. B ultimately disagreed and rejected grievant's contentions. This discipline was not grieved and became final. Grievant had not grieved any of the earlier written reprimands.

According to the City's evidence, in spite of the five day suspension, Mr. Y racked up another spate of missed bins on his commercial route on December 14, 16 and 17, 2009, was allegedly uncooperative with staff on December 22, and allegedly delivered substantially less recycling tonnage on December 17. The City decided to terminate Mr. Y and, on January 4, 2010, sent him a notice of intent to terminate employment. City Exh. 2. He protested it, and the *Skelly* hearing which lasted one to one and a half hours (according to Mr. B) was held on January 14. Mr. Y admitted that he had failed to pick up the bin at one location but denied the rest; he also claimed that the comparison recyclable loads (included in the City's notice of intent to terminate to highlight the difference between "typical" loads of 3.33-6.49 tons and grievant's load on December 17 of .78 tons) actually consisted of combined loads. In response, Mr. B instructed the City's Personnel Manager, C. D., to investigate the factual assertions in the original notice of intent to terminate. She confirmed all of the facts except for one missed trash load which could be neither confirmed nor denied. The City stood by its decision to discharge and so notified grievant by letter dated February 2, 2010. City Exh. 3.

With respect to the missed bins, the City relied on emails or phone calls from customers complaining about the problem. Its position is that customers' complaints are prima facie valid because they would have no motive to falsely claim that their trash bins had not been emptied when, in fact, they had. There is no dispute that on December 17, 2009, grievant picked up .78 tons of recycling material. City Exh. 14.

Three Performance Evaluation Reports were admitted. Grievant introduced one for the August 2006 - August 2007 period; it rated him overall as "above average" with "excellent" ratings for quantify and quality of work, attitude and initiative and adaptability, "above average" in work habits, and "needs improvement" in personal traits. Grievant Exh. 1. The narrative statement for the latter summarizes his being aggressive and rude to the office staff at a housing complex in telling them that they were "contaminating their recycling bin again." Id. at p. 4. It also refers to his missing a pickup on two consecutive weekend pickup days; grievant claimed that it was because his key didn't work on either occasion, but his supervisor faulted him for not having reported it when it failed to work the first time and that missing pickups "two weeks in a row was unacceptable."

The City introduced two Performance Evaluation Reports: one from August 2007 - August 2008 [City Exh. 10] and another from August 2008 - August 2009 [City Exh. 11]. The overall evaluation on both was "needs improvement." Both reports state that Mr. Y had been rude to customers and missed many scheduled pickups. One of them faulted him for being dishonest about the broken gas line at the Doubletree Hotel. E. F. was grievant's crew leader

(and immediate supervisor) since 2004, and he filled out each Report.

In his testimony, Mr. Y either denied missing the December pickups (except for one at 736 South Indian Hill Blvd. which he admitted he missed) or claimed that the customer reports were inaccurate or deliberately false. He also testified that he did not know about these alleged problems until December 22 when he again met with Mr. B. Because he was told about the alleged problems well after they allegedly occurred, he implied that he had no way of verifying or denying them.

Drivers occasionally miss a pickup or two during any given week [F's testimony]. The parties stipulated that during 2010 there were approximately 450 missed pickups; five were commercial stops and the rest were residential. The residential misses occur because the customers don't move their cans to the curb on time which, of course, would not be a driver's fault. Most of the commercial misses are explainable: a locked gate, a vehicle is blocking the bin, and so forth. Drivers are expected to return to the location and try again. If they still can't access the bin, they are expected to call it in so the office is alerted. Grievant claims that if a pickup is missed and the customer calls in to complain, the practice is for the office to call the driver to verify the report and, if possible, to return to the location and make the pickup. He disagreed with F' testimony that the standard practice is to try to return to the location. He testified that he was never called by F (or anyone else) after a customer called in to complain about a missed pickup. Mr. F testified that he did try to call grievant on December 14 but he didn't answer the call.[1] On December 14, 16, and 17, grievant was assigned to commercial routes. City Exh. 3, Attachment B.

Grievant also claimed that all of his discipline was imposed after F became his immediate supervisor in 2004 and that no complaints were recorded during January thru March 2009 when F was off on medical leave. If true, this allows an inference that F for whatever reason or reasons, was particularly motivated to pick on grievant. Mr. Y suffered a work-related injury and F's motivation was to retaliate against him for having filed it. He also testified that F criticized him frequently for bringing in over-loaded trucks, but the other drivers did the same thing and grievant was the only one criticized. Another example of harassment, according to grievant, was F's request to him that he write down all of the routes on his own time, rather than paid time.

Finally, grievant testified that the low tonnage of recyclables was attributed to the fact that he was driving the recycle route for only about two hours on December 17 rather than a full shift and because of the City rule requiring each driver to deliver his load to the recycling center, regardless of weight, each day.

/ / /

[1] All drivers are issued a cell phone with an intercom feature. The testimony is unclear as to why Mr. F tried to call grievant; presumably he did so because he had received a customer complaint about a missed pickup. The customer emails, etc. attached as exhibits to the termination letter [City Exh. 3, Attachment C] do not reflect a complaint on December 14.

OPINION

The evidence before me clearly shows a pattern of missed commercial pickups which, apart from the other instances of alleged misconduct cited in the notice of intent to terminate, shows that Mr. Y was, in fact, inefficient and neglectful in the performance of his duties on December 14, 16 and 17. Grievant's testimony about working the recycling route on December 17 for only two hours (thus accounting for the low tonnage) was undisputed, so I am not persuaded that that ground is sufficient to support the decision to discharge. Nevertheless, the pattern of inefficiency and substandard job performance is significant enough to warrant discipline. Whether that deserved discipline should include discharge is discussed below.

This conclusion rests on the factual finding that grievant failed to make the pickups on December 14, 16 and 17 as alleged. First, it is undisputed that he was assigned to the commercial routes in question and that he was thoroughly familiar with each route. Second, I cannot ignore the customer complaints that this, in fact, occurred. It is highly doubtful – not impossible, but very doubtful – that this many customers would falsely claim that their bins had not been emptied. Mr. F checked out each call, and he found no basis to question the customers' assertions. The only rational explanation for this is that Mr. Y simply failed to empty those bins. This misconduct, especially when it occurs repeatedly, clearly falls within the MOU's categories of incompetence (at least on the days the problems occurred), inefficiency, neglect of duty, and substandard job performance.

This substandard performance dates back to 2004 around the time F became grievant's supervisor. From then on, grievant felt picked on by F and singled out for criticism. Mr. Y takes virtually no responsibility for the many instances of unacceptable work dating back to 2004. He disagreed with the warnings and five day suspension, yet none were grieved. Arbitrators generally accept the facts underling prior discipline as true, especially those facts not grieved or arbitrated, for the simple reason that there is no practical alternative. As long as those facts are plausible and there is no evidence in the record implying or proving some motive on the employer's part to target the grievant based on improper reasons (such as race, ethnicity, age, political or union affiliation, and so forth), the facts are accepted as true and the discipline imposed as appropriate. Here, there is more. As mentioned above, I have no basis on the evidence provided in this case to question the customer complaints about missed pickups and rude behavior. And the evidence of dishonesty with respect to the broken gas line underlying the May 2008 written reprimand was also established by independent evidence and grievant's admission. Therefore, the written reprimands and the five-day suspension were all supported, not only by the failure to grieve them, but also by evidence introduced at this hearing.

I have little doubt that Mr. Y, genuinely and deeply, felt picked on by Mr. F who might very well have felt irritated by grievant's repeated unacceptable performance. Because of that hisory, he might have been more critical of grievant's work and asked grievant to do City work on his own time. On the evidence introduced, however, grievant's reaction appears to be caused by the recurring instances of his unacceptable performance over the years. We don't know why grievant screwed up, but he surely did, and especially so in 2009. Mr. Y questions this pointing to the overall "above average" rating in his 2006-2007 performance evaluation. But F also prepared, with his supervisor's help, that evaluation as well as the two others, and he did, in

fact, note an improvement needed category while referring to customer complaints for being rude and missing pickups. If F was improperly targeting grievant and setting him up for discharge, I would expect that all of his performance evaluations would be negative overall and they would contain factual assertions not supported by any evidence. That is not the case, however, and F seems to be merely reporting his experiences with grievant as they occur, good and bad. Unfortunately, the bad kept re-occurring, even after the five-day suspension. The issue then becomes whether discharge is appropriate in light of the misconduct in December and the prior discipline.

I agree with the notion, as expressed by Arbitrator Moats in *Amax, Inc.*, 76 LA 607, that "implicit in the doctrine of progressive discipline is a correlative duty on the part of the employee to progressively improve." Here, the pattern of grievant's poor work compels me to conclude that he failed to improve his job performance, in spite of his training and experience as a senior solid waste operator. The prior discipline did not apparently have much effect, if any, on his overall performance.

Whether a particular pattern of unacceptable work is sufficient to justify discharge is often a difficult call. Obviously, the City decided that the pattern involved here was sufficient, so I am faced with the dilemma of reviewing that decision with the understanding that I do not operate the City and that a fair amount of discretion must remain with management to operate the City's business. I am not required by the MOU or generally accepted workplace norms to defer to the City's decision to discharge and reverse it only when and if I conclude that the City abused that discretion under the circumstances presented. Nevertheless, when the employer's decision is within a range of reasonable responses to a pattern of employee behavior, and there is no principled basis on which to criticize the decision to discharge, the employer's decision should be upheld.

Here, the City could have imposed a longer suspension period to try to drive home the point to grievant that this pattern of unacceptable work had to change or it could have terminated his employment. Both would have been reasonable responses to the documented instances of unacceptable job performance. I cannot find any principled basis to conclude that the City inappropriately chose discharge rather than a lesser form of discipline.

Finally, Mr. Y was on notice of the possible serious employment consequences of unacceptable job performance because he was explicitly told in his last performance evaluation that if he did not "improve in the next six months [after returning from the five day suspension] further disciplinary action will be taken, which could be termination from employment with the City of Z." City Exh. 11, p. 10 (remarks by Director, last paragraph).

/ / /

AWARD

For the above reasons, I recommend that the City deny the grievance and uphold its decision to terminate Mr. Y's employment.

Dated: November 16, 2010

Respectfully submitted,

Richard Solomon

RICHARD C. SOLOMON
Arbitrator